

No. 15541

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United States  
Court of Appeals  
for the Ninth Circuit

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BANK OF NEVADA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Nevada



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BANK OF NEVADA,

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**Transcript of Record**

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**Appeal from the United States District Court  
for the District of Nevada**



## NAMES AND ADDRESSES OF ATTORNEYS

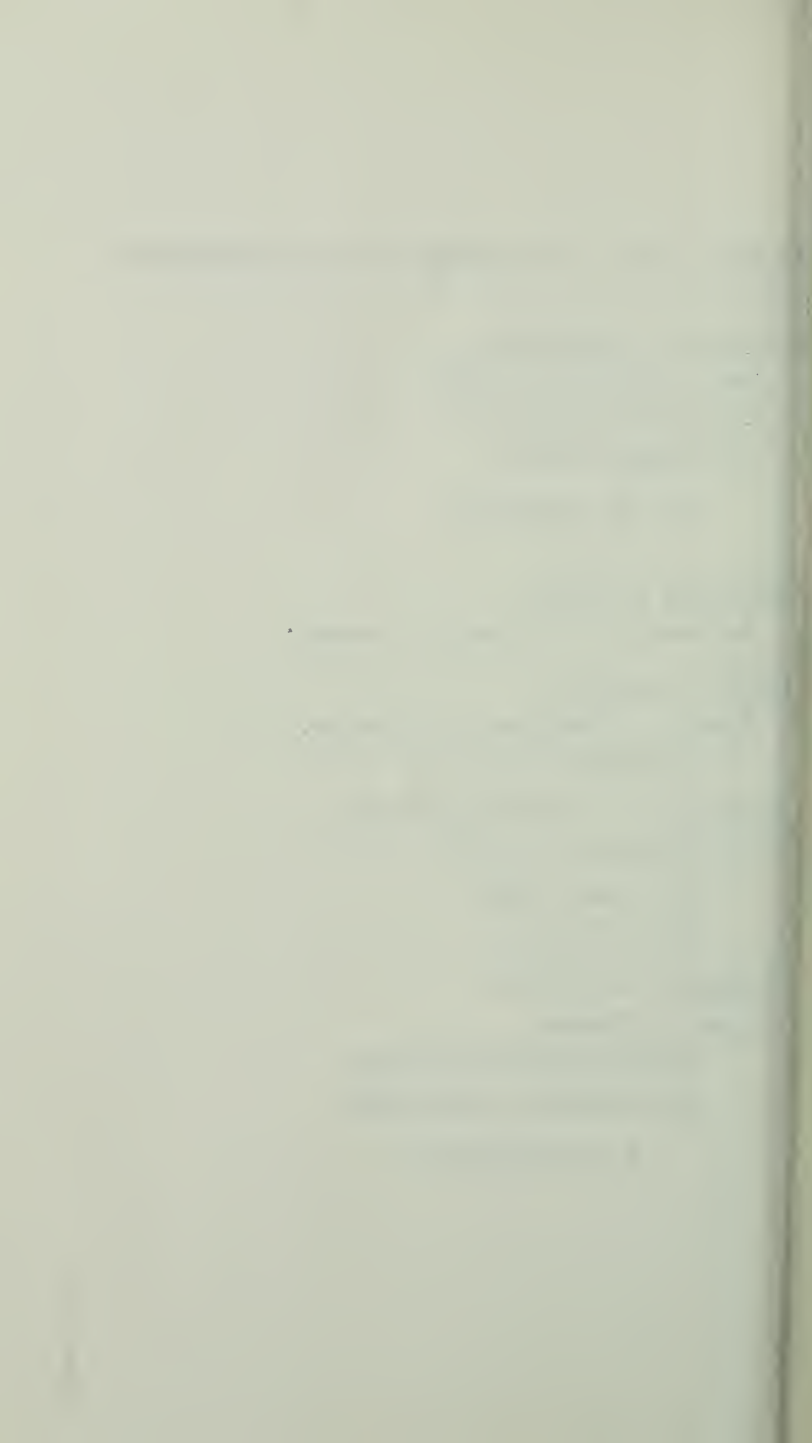
MILTON W. KEEFER,  
Suite 15-17 Cornet Bldg.,  
Fourth and Fremont,  
Las Vegas, Nevada,  
For the Appellant.

CHARLES K. RICE,  
Assistant U. S. Attorney General;

ELLIS N. SLACK,  
Attorney, Department of Justice,  
Washington 25, D. C.;

FRANKLIN P. RITTENHOUSE,  
United States Attorney,  
P.O. Box 1589,  
Reno, Nevada;

GODFREY MUNTER,  
Special Attorney,  
Internal Revenue Service,  
San Francisco, California,  
For the Appellee.



In the United States District Court  
for the District of Nevada

No. 135

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

BANK OF NEVADA,  
Defendant.

### COMPLAINT

The United States of America, Plaintiff, by its attorney, Franklin P. R. Rittenhouse, United States Attorney for the District of Nevada, alleges the following:

#### I.

This action has been authorized by the Commissioner of Internal Revenue of the United States and is brought under the direction of the Attorney General of the United States.

#### II.

This action arises under the Act of June 25, 1948, c. 646; 62 Stat. 933; U.S.C., Title 28, Sec. 1345, as hereinafter more fully appears.

#### III.

Defendant is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Las Vegas, Nevada. [2\*]

\*Page numbering appearing at foot of page of original Certified Transcript of Record.

## IV.

On or about November 15, 1954, withholding and Federal Insurance Contributions Taxes for the calendar year 1954 in the principal amount of \$804.50 were assessed against J. D. Bentley, hereinafter referred to as taxpayer. A Notice of Federal Tax Lien pertaining to this assessment was filed with the Office of the County Recorder, Clark County, Nevada, on January 12, 1955.

## V.

On or about March 1, 1955, Excise Taxes for the calendar year 1954 in the principal amount of \$187.51 were assessed against taxpayer. A Notice of Federal Tax Lien pertaining to this assessment was filed with the Office of County Recorder, Clark County, Nevada, on June 13, 1955.

## VI.

Subsequent to the assessments referred to above the District Director of Internal Revenue gave notice to and made demand upon taxpayer for payment of such taxes, but taxpayer refuses to pay such taxes.

## VII.

On June 10, 1955, the taxpayer had on deposit in an account with the defendant bank the sum of not less than \$878.16.

## VIII.

On June 10, 1955, a Notice of Levy, for the assessments described above plus statutory addition, in the total amount of \$1,069.70 and a Warrant for



Distrainment were served upon the Bank of Nevada, 102 Fremont Street, Las Vegas, Nevada.

IX.

On June 14, 1955, a Final Demand for payment of the [3] above-described Notice of Levy was served upon the Bank of Nevada, 102 Fremont Street, Las Vegas, Nevada.

X.

The defendant refuses to surrender the balance due in the taxpayer's bank account as of June 10, 1955, to the District Director of Internal Revenue, thereby rendering itself liable to the United States for such amount under the provisions of Section 6332 of the Internal Revenue Code of 1954 (26 U.S.C., Sec. 6332).

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$878.16 together with costs and interest as allowed by law, and for such further relief to which it may be justly entitled.

/s/ FRANKLIN P. RITTENHOUSE,  
United States Attorney.

[Endorsed]: Filed Sept. 28, 1955. [4]

[Title of District Court and Cause.]

## ANSWER

### I.

Referring to Paragraphs I and II of Plaintiff's Complaint, Defendant alleges that it is without sufficient information or knowledge to form a belief as to the allegations contained therein.

### II.

Defendant admits all of the allegations contained in Paragraph III of Plaintiff's Complaint on file herein.

### III.

Referring to Paragraphs IV, V and VI of Plaintiff's Complaint, Defendant alleges that it is without sufficient information or knowledge to form a belief as to the allegations contained therein.

### IV.

Defendant admits the allegations contained in Paragraphs VII, VIII, IX and X of Plaintiff's Complaint on file herein.

## Affirmative Defense

### I.

Defendant on or about June 10, 1955, and prior thereto, was the owner and holder of a demand note dated April 16, 1955, in the principal sum of

2,000.00, with interest thereon at the rate of six per cent (6%) per annum, upon which there was due and owing a balance in the sum of \$1,500.00, together with accrued interest, a copy of which is attached hereto marked Exhibit A and thereby made a part hereof.

## II.

Defendant on or about February 28, 1955, and on or about [5] May 31, 1955, entered into written agreements with J. D. Bentley, its depositor and the taxpayer named in Plaintiff's Complaint, forming a part of said depositor's financial statement, which said agreements provided that in the event any deposit account of said depositor or any other property held by Defendant should be attempted to be obtained or held by writ of execution, garnishment, attachment, or other legal process, then all of the obligations of said depositor to the Defendant, at the option of Defendant, would become immediately due and payable without demand or notice. Copies of said agreements are attached hereto marked Exhibits B and C, respectively, and thereby made a part hereof.

## III.

Defendant on June 10, 1955, exercised its lien or right of set-off against said depositor, J. D. Bentley, pursuant to the said demand note and said agreements, hereinabove described, and thereby set off or credited against said note the sum of \$878.16 which said depositor had on deposit in an account with Defendant.

Wherefore, Defendant prays that Plaintiff take nothing by reason of its Complaint herein and the judgment be entered accordingly for Defendant.

/s/ MILTON W. KEEFER,

Attorney for Defendant Bank  
of Nevada.

[No exhibits to be printed.]

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 8, 1955. [6]

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[Title of District Court and Cause.]

### PRETRIAL ORDER

The above-entitled action having come on regularly for pretrial hearing on April 27, 1956, and the parties having appeared by their respective counsel of record; and the court having jurisdiction of both the subject matter and the parties; and the parties having advised the court that a complete agreement had been reached with respect to the material and relevant facts and that this agreement would be presented to the court in the form of a stipulation of facts and attached exhibits; and the parties having filed herewith such a stipulation with exhibits "A" through "H" attached, it is hereby ordered

1. That the stipulation of facts, with Exhibits "A" through "H" attached thereto, presents all

the factual data which the parties consider to be necessary to decision and that no further factual data will be adduced by the parties except upon request by the court. [7]

2. That, in accordance with the understanding reached at the hearing, this controversy involves conflicting claims to the sum of \$878.16 which sum was on deposit in the taxpayer-debtor's checking account with the defendant when plaintiff on June 10, 1955, served a levy upon the defendant. Whether defendant is liable to plaintiff for this sum is the only issue here and the decision of that issue depends upon whether defendant's claimed right of set-off is superior to the rights of the plaintiff based on its lien and levy.

3. That the parties, within 60 days from the date of entry of this order, will submit briefs on the issue framed above and that thereafter, upon notification by the court, will present oral arguments in support of their contentions.

Dated Aug. 28, 1956.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed Aug. 28, 1956. [8]

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[Title of District Court and Cause.]

### STIPULATION OF FACTS

1. This is a civil action for the collection of taxes; jurisdiction over this suit is granted by Sec-

tions 1340 and/or 1345 of Title 28, United States Code. This suit has been authorized by the Commissioner of Internal Revenue of the United States and has been brought under the direction of the Attorney General of the United States.

2. The defendant is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Las Vegas, Clark County, Nevada.

3. On November 15, 1954, certain Withholding and Federal Insurance Contributions Act taxes for the calendar year 1954 in the amount of \$804.50 were assessed against J. D. Bentley of Las Vegas, Nevada, hereinafter referred to as the taxpayer. Thereafter, and on November 16, 1954, taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

4. On January 12, 1955, a notice of tax lien pertaining to this assessment of Withholding and Federal Insurance [9] Contributions Act taxes was filed in the Office of the County Recorder, Clark County, Nevada. A copy of this notice is attached hereto and marked Exhibit "A."

5. On February 28, 1955, and on August 3, 1954, the taxpayer submitted to the Bank of Nevada financial statements, copies of which are attached hereto and marked Exhibits "B" and "B-1," respectively.



6. On March 1, 1955, certain federal excise taxes for the calendar year 1954 in the amount of \$187.51 were assessed against the taxpayer, and on that same date the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

7. On April 16, 1955, J. D. Bentley and his wife, Doris L. Bentley, borrowed two thousand dollars from the Bank of Nevada and executed a promissory note in favor of the bank for that amount. A copy of this note is attached hereto and marked Exhibit "C."

8. On May 31, 1955, the taxpayer submitted to the Bank of Nevada another financial statement, a copy of which is attached hereto and marked Exhibit "D."

9. On June 10, 1955, the taxpayer had on deposit in an account with the Bank of Nevada the sum of not less than \$878.16. A copy of the checking account maintained by the taxpayer under the name of Bentley's Trading Post showing the deposit of the loan proceeds on April 16, 1955, and other deposits and withdrawals for the period April 1, 1955, to September 6, 1955, is attached hereto and marked Exhibit "E." On that day (June 10, 1955), the District Director of Internal Revenue, through H. L. Collomb, collection officer, served a Notice of Levy, Form 668-A, upon the Bank of Nevada by delivering it to E. K. Phillips, Assistant Cashier, at 1:45 p.m. This Notice of Levy covered both of the as-

sessments [10] referred to above together with statutory additions thereto; a copy of the Notice of Levy is attached hereto and marked Exhibit "F."

10. On that same day, A. M. Smith, Vice-president and Manager of the First and Fremont Branch of the Bank of Nevada, wrote to H. L. Collomb, collection officer, as follows:

"This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.

"I would like to take this opportunity to inform you that we have exercised our right to set off and applied the funds in this account to an unsecured indebtedness held at this bank consequently, there are no funds available under your levy."

The "unsecured indebtedness" referred to in this letter was the balance of the note referred to above in paragraph seven, which, at the time of the levy amounted to approximately \$1,500.00.

11. On June 13, 1955, a notice of federal tax lien pertaining to the assessment of federal excise taxes was filed in the Office of the County Recorder Clark County, Nevada. A copy of this notice is attached hereto and marked Exhibit "G."

12. On June 14, 1955, the District Director of Internal Revenue, through H. L. Collomb, collection officer, served a Final Demand, Form 668-C upon the Bank of Nevada by delivering it to A. M. Smith, Vice-President and Manager of the First



Fremont Branch of the Bank of Nevada, at 11:10 a.m. A copy of this demand is attached hereto and marked Exhibit "H."

13. This suit was commenced in the United States District Court for the District of Nevada on September 28, 1955.

Date: August 16, 1956.

/s/ FRANKLIN RITTENHOUSE,  
United States Attorney, and  
HOWARD W. BABCOCK,  
Assistant U. S. Attorney;

By /s/ HOWARD W. BABCOCK,  
Attorneys for Plaintiff.

Date: August 28, 1956.

/s/ MILTON W. KEEFER,  
Attorney for Defendant. [11]



[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION

It is hereby stipulated and agreed by the undersigned counsel of record for the Plaintiff and Defendant, that the following statement is true and should be added to the stipulation of facts filed on August 28, 1956, as paragraph 10a:

The Bank of Nevada did, on the 10th day of June, 1956, subsequent to 1:45 p.m. of said day, exercise its right of set-off and applied the funds in this account to the taxpayers' unsecured indebtedness referred to in the Stipulation of Facts on file herein.

Date: Oct. 29, 1956.

/s/ FRANKLIN RITTENHOUSE,  
United States Attorney, and

HOWARD W. BABCOCK,  
Assistant U. S. Attorney;

By /s/ HOWARD W. BABCOCK,  
Attorneys for Plaintiff.

Date: Oct. 2, 1956.

/s/ MILTON W. KEEFER,  
Attorney for Defendant.

[Endorsed]: Filed Nov. 7, 1956. [12]

[Title of District Court and Cause.]

## OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The case was submitted upon stipulation of facts together with attached exhibits and supplemental stipulation filed November 7, 1956. The parties are in agreement as to the questions presented for determination; viz.:

1. Whether the defendant was in possession of property of the delinquent taxpayer which was subject to the tax lien sought to be levied against said bank deposits of the taxpayer, and

2. Whether a Federal tax lien on the bank account of a delinquent taxpayer is superior to the claimed right of set-off in the Bank by virtue of the taxpayer's note to the Bank executed after the tax lien arose, or by virtue of an agreement between the Bank and the taxpayer contained in a financial statement executed with the Bank before the tax lien arose.

However, the Bank's contentions are largely based upon its assumption that the taxpayer's note was payable at any time without demand.

In *United States v. Graham, et al.*, 96 F. Supp. 318, 320, affirmed, *State of California, et al., v. United States*, 9 Cir., 195 F. 2d 530, Judge Harrison held:

"[4-6] The contention that there is no property against which the plaintiff's tax liens may be fore

closed is without support. 'Congress [90] intended to subject all of the taxpayer's property, except that specifically exempt to the payment of taxes. "Property" is a word of very broad meaning and when used without qualification, may reasonably be construed to include obligations, rights and other intangibles, as well as physical things. "Property" within the tax laws should not be given a narrow or technical meaning.' *Citizens State Bank of Barstow, Texas, v. Vidal*, 10 Cir., 114 F. 2d 380, 382. \* \* \*

"[7] There yet remains the question of whether or not the state may set off against its debt to the taxpayer the taxes owed by the taxpayer to the state. It is unquestioned that under Secs. 3672 and 3710(a), Title 26, U.S.C.A., the rights of the Collector do not extend beyond those of the taxpayer whose right to property is sought to be levied upon. *U. S. v. Winnett*, 9 Cir., 1947, 165 F. 2d 149. If the state had a right of set-off against the taxpayer prior to the United States' asserted lien and priority, the Collector would be bound to recognize the right of the state to set off.

"[8] The 1942 income tax assessment against the taxpayer, Warren C. Graham, was received by the Collector on March 23, 1945, more than a year and three months before the leases with the State of California were entered into. The tax due under this assessment is still due. Any money that accrued to the taxpayer under the lease with the state accrued with a lien impressed upon it. There was no

period of time in which the State of California's right of set-off could have been asserted against the debt to the taxpayer that the property was not impressed with the tax lien. In *U. S. v. Winnett*, supra, the right of set-off accrued before any tax liens arose."

The sum of \$878.16 on deposit with defendant Bank in the account of the taxpayer was, at the time of the service of Notice of Levy by the District Director of Internal Revenue, property of Bentley, the taxpayer.

The financial statements, Exhibits "B" and "B-1," executed prior to the loan evidence by the note of April 16, 1955, each contained the following

"The undersigned, for the purpose of procuring and establishing credit from time to time with you and to induce you to permit the undersigned to become indebted to you on notes, endorsements, guarantees, overdrafts or otherwise, furnishes the following as being a true and correct statement of the financial condition of the undersigned on the above date, and agrees to notify you immediately of the extent and character of any material change [91] in said financial condition, and also agrees that if the undersigned, or any endorser or guarantor of any of the obligations of the undersigned, at any time fails in business or becomes insolvent, or commits an act of bankruptcy, or if any deposit account of the undersigned with you, or any other property of the undersigned held by you, be at

tempted to be obtained or held by writ of execution, garnishment, attachment or other legal process, or if any of the representations made below prove to be untrue, or if the undersigned fails to notify you of any material change as above agreed, then, and in such case, at your option, all of the obligations of the undersigned to you, or held by you, shall immediately become due and payable, without demand or notice. This statement shall be construed by you to be a continuing statement of the condition of the undersigned, and a new and original statement of all assets and liabilities upon each and every transaction in and by which the undersigned hereafter becomes indebted to you, until the undersigned advises in writing to the contrary."

Upon the above-quoted paragraph of the financial statements and the note of April 16, 1955, the Bank bases its claimed right of set-off. The note provided that:

"On Demand; if no demand is made then on August 14th, 1955, for value received, I promise to pay in lawful money of the United States of America, to the order of the Bank of Nevada \* \* \* Two Thousand and no/100 Dollars. \* \* \*"

"Although the maker of a demand note is not in default until he refuses payment until after demand therefor, it is generally held that a note payable on demand is due immediately, so that suit may be maintained on it at any time after delivery without any other demand than the suit. This rule may not



apply, however, where there is something on the paper or in the circumstances under which it was given to show that it was not the intention that it should become due immediately.”

—10 C.J.S. 744, § 247b;

Sullivan v. Ellis,

8 Cir., 219 F. 696, citing 7 Cyc. 848, 849.

From the above-quoted portion of the note it appears that it was not the intention of the payee or the maker of the note that the same was to be due immediately upon delivery. It was the evident intention of the parties that the note was to become due August 14, 1955, unless in the meantime a formal demand by the Bank for payment was [92] made.

Defendant Bank, in its brief, states:

“\* \* \* the bank had a right of set-off and thereby a lien upon any funds of the taxpayer on deposit with it, which arose prior in time to the date of November 15, 1954, which was the date upon which the tax lien arose. This lien of the bank was created by virtue of the financial statement dated August 31, 1954 (Exhibit B-1), wherein the bank was given the right by the depositor to apply any and all funds against any and all indebtedness of the taxpayer-depositor without demand and without notice to the taxpayer-depositor when and as certain conditions existed or came into being which jeopardized the claim of the bank under its promissory de



mand note, and which materially changed the taxpayer's-depositor's financial condition."

On June 10, 1955, the taxpayer had on deposit with defendant Bank in a checking account the sum of \$878.16. On November 15, 1954, Withholding and Federal Insurance Contribution Act taxes for the calendar year 1954 in the amount of \$804.50 were assessed against the taxpayer. On March 1, 1955, Federal Excise taxes for the calendar year 1954, in the amount of \$187.51, were assessed against the taxpayer.

On June 10, 1955, the District Director of Internal Revenue caused to be served upon the Bank a Notice of Levy covering both of the assessments. As has been noted, at the time of the service of the levy, no part of the obligation secured by the note was due and no contention is made that at that time the taxpayer was insolvent.

Therefore, the principles stated in the following quotation can have no application here:

"The propriety of allowing the offset is at once apparent, and, in view of the fact that the lessor had become insolvent, it is immaterial that under the terms of the lease the return of the deposit was not yet due. In *City Investment Company v. Pringle*, 73 Cal. App. 782, 239, P. 302, the court reviewed the authorities relating to set-offs against insolvent debtors, and there said at page 791 of 73 Cal. App., 239, P. 302, 306, '\* \* \* insolvency itself is a sufficient ground for the application of equita-

ble set-off, and the fact, that the indebtedness on one side is not due when set-off is claimed, constitutes no obstacle to the assertion of the right as against an insolvent, debtor.' ”

—Gordon v. Foote,

Cal. App., 7 P. 2d 709, 710. [93]

On the same day, June 10, 1955, after service of the levy, the Bank attempted to exercise its claimed right of set-off of the balance remaining unpaid on the note against the \$878.16 on deposit to the credit of the taxpayer. From Exhibit “E” it appears that for the period beginning April 1, 1955 to September 6, 1955, the Bank accepted taxpayer’s deposits and honored his withdrawals. The exhibit indicates substantial withdrawals by depositor for several months after the claimed right of set-off.

The Federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan of April 16, 1955, and prior to any right of setoff on the part of the Bank, if such right existed.

The Court’s attention has been called to § 873 Nev. Comp. Laws, 1929, which is as follows:

“Every garnishee shall be allowed to retain and deduct out of the property, effects, or credits of the defendant in his hands all demands against the plaintiff and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, whether the same are due at the time due or not, \* \* \*.”

That this state law cannot give superiority to the Bank's claimed right of setoff over the pre-existing liens is made apparent by Mr. Chief Justice Stone in *Michigan v. United States*, 317 U.S. 338, 340, where he stated:

"We do not stop to inquire whether this construction of the state statutes is the correct one, for we think the argument ignores the effect of a lien for federal taxes under the supremacy clause of the Constitution. The establishment of a tax lien by Congress is an exercise of its constitutional power 'to lay and collect taxes.' Article I, § 8 of the Constitution. *United States v. Snyder*, 149 U. S. 210. And laws of Congress enacted pursuant to the Constitution are by Article VI of the Constitution declared to be 'the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.'

"'It is of the very nature and essence of a lien, that no matter into whose hands the property [94] goes, it passes cum onere.' \* \* \* Hence, it is not debatable that a tax lien imposed by a law of Congress, as we have held the present lien is imposed, cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision. *United States v. Snyder*, *supra*; *United States v. Greenville*, 118 F. 2d 963."

Even if any rights the Bank might have had under the Nevada statute had the dignity of a lien,

no right under that statute could displace the prior tax liens existing here.

On June 10, 1955, and prior thereto, the amount on deposit to the credit of Bentley was burdened with the prior existing Federal tax liens. On that date Bentley was solvent and the note of April 16, 1955, had not matured and would not become payable prior to August 14, 1955, in the absence of a demand. In the face of these facts, the Bank had no right to setoff and apply the funds in Bentley's account on the promissory note.

Upon the stipulation of the parties, the Court finds:

#### Findings of Fact

1. This is a civil action for the collection of taxes; jurisdiction over this suit is granted by §§ 1340 and/or 1345 of Title 28, U.S.C.A. This suit has been authorized by the Commissioner of Internal Revenue of the United States and has been brought under the direction of the Attorney General of the United States.

2. The defendant is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Las Vegas, Clark County, Nevada.

3. On November 15, 1954, certain Withholding and Federal Insurance Contributions Act taxes for the calendar year 1954 in the amount of \$804.10 were assessed against J. D. Bentley of Las Vegas, Nevada, hereinafter referred to as the [95] ta-

payer. Thereafter, and on November 16, 1954, taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

4. On January 12, 1955, a notice of tax lien pertaining to this assessment of Withholding and Federal Insurance Contributions Act taxes was filed in the Office of the County Recorder, Clark County, Nevada, Exhibit "A."

5. On February 28, 1955, and on August 31, 1954, the taxpayer submitted to the Bank of Nevada financial statements, Exhibits "B" and "B-1," respectively.

6. On March 1, 1955, certain Federal Excise taxes for the calendar year 1954 in the amount of \$187.51 were assessed against the taxpayer, and on that same date the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

7. On April 16, 1955, J. D. Bentley and his wife, Doris L. Bentley, borrowed \$2,000 from the Bank of Nevada and executed a promissory note in favor of the Bank for that amount, Exhibit "C."

8. On May 31, 1955, the taxpayer submitted to the Bank of Nevada another financial statement, Exhibit "D."

9. On June 10, 1955, the taxpayer had on deposit in an account with the Bank of Nevada the sum of not less than \$878.16, Exhibit "E." On that day,



June 10, 1955, the District Director of Internal Revenue, through H. L. Collomb, Collection Officer, served a Notice of Levy, Form 668-A, upon the Bank of Nevada by delivering it to E. K. Phillips, Assistant Cashier, at 1:45 p.m. This Notice of Levy covered both of the assessments, referred to in Findings Nos. 3 and 6, together with statutory additions thereto, Exhibit "F."

10. On that same day, A. M. Smith, Vice-President and Manager of the First and Fremont Branch of the Bank of Nevada, [96] wrote to H. L. Collomb, Collection Officer, as follows:

"This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.

"I would like to take this opportunity to inform you that we have exercised our right to setoff and applied the funds in this account to an unsecured indebtedness held at this bank; consequently, there are no funds available under your levy."

The "unsecured indebtedness" referred to in this letter was the balance of the note referred to above in Finding No. 7, which, at the time of the levy, amounted to approximately \$1,500.

11. The Bank of Nevada did, on the 10th day of June, 1955, subsequent to 1:45 p.m. of said day, exercise its "claimed" right of setoff and applied the funds in this account to the taxpayer's unsecured indebtedness.

12. On June 13, 1955, a notice of Federal tax lien pertaining to the assessment of Federal Excise taxes was filed in the Office of the County Recorder, Clark County, Nevada, Exhibit "G."

13. On June 14, 1955, the District Director of Internal Revenue, through H. L. Collomb, Collection Officer, served a Final Demand, Form 668-C, upon the Bank of Nevada by delivering it to A. M. Smith, Vice-President and Manager of the First and Fremont Branch of the Bank of Nevada, at 11:10 a.m., Exhibit "H."

### Conclusions of Law

The Court concludes:

1. That plaintiff's tax liens are paramount and valid liens and that plaintiff is entitled to judgment in the amount of \$878.16 plus legal interest and costs as provided by § 6332, Internal Revenue Code, 1954, 26 U.S.C.A., § 6332.

The plaintiff, United States of America, shall submit [97] a form of judgment to the Court for approval.

Dated: This 14th day of March, 1957.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed March 14, 1957. [98]

In the United States District Court  
for the District of Nevada

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

BANK OF NEVADA,  
Defendant.

### JUDGMENT

This matter having been submitted to the Court upon a stipulation of facts together with attached exhibits and a supplemental stipulation; and the arguments of counsel having been heard; and the Court having made its findings of fact and conclusions of law, now makes its judgment.

It Is Hereby Ordered, Adjudged, and Decreed that the Bank of Nevada, defendant herein, pay to the plaintiff herein, United States of America, the sum of \$878.16, together with interest thereon at the rate of 6 per centum per annum from June 10 1955, to the date of entry of this judgment and plaintiff's costs incurred herein.

Dated this 29th day of March, 1957.

/s/ ROGER T. FOLEY,  
United States District Judge.

[Endorsed]: Filed March 29, 1957. [99]



[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Bank of Nevada, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 29th day of March, 1957.

/s/ MILTON W. KEEFER,  
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 5, 1957. [100]

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[Title of District Court and Cause.]

### DESIGNATION OF RECORD ON APPEAL

Appellant, Bank of Nevada, designates the following portions of the record, constituting the entire record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint on file herein.
2. Defendant's Answer to Complaint on file herein.
3. Pretrial Order, dated August 28, 1956.
4. Stipulation of Facts, entered the 28th day of August, 1956, together with the Supplemental Stipulation entered the 29th day of October, 1956.
5. Exhibit A, Exhibit B, Exhibit B1, Exhibit C,

Exhibit D, Exhibit E, Exhibit F, Exhibit G and Exhibit H.

6. Brief for the Plaintiff. [103]
7. Brief for the Defendant.
8. Plaintiff's Supplemental Citations.
9. Defendant's Reply to Plaintiff's Supplemental Citations.
10. Transcript of Oral Argument of January 17, 1957.
11. Opinion, Findings of Fact and Conclusion of Law, filed March 14, 1957.
12. Judgment, entered March 29, 1957.
13. Notice of Appeal, filed April 5, 1957.
14. This Designation of Record on Appeal.

Dated this 12th day of April, 1957.

/s/ MILTON W. KEEFER,

Attorney for Appellant, Bank  
of Nevada.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1957. [104]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby

certify that the attached and accompanying documents are the originals filed in this Court, or true and correct copies thereof, as called for by the Designation of Contents of Record on Appeal filed herein by the appellant, and that they constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 24th day of April, 1957.

[Seal]                      OLIVER F. PRATT,  
Clerk;

By /s/ RAY MONA SMITH,  
Deputy Clerk. [105]

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[Endorsed]: No. 15541. United States Court of Appeals for the Ninth Circuit. Bank of Nevada, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: April 26, 1957.

Docketed: May 2, 1957.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 15541

BANK OF NEVADA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

## STIPULATION

It is hereby stipulated and agreed by and between the Appellant, Bank of Nevada, and the Appellee, United States of America, that there be deleted from the Record on Appeal in the above-entitled action the following, which were designated in the Designation of Record on Appeal, filed April 12, 1957, with the Clerk of the United States District Court:

6. Brief for the Plaintiff.
7. Brief for the Defendant.
8. Plaintiff's Supplemental Citations.
9. Defendant's Reply to Plaintiff's Supplemental Citations.
10. Transcript of Oral Argument of January 11, 1957.

Dated: May 1, 1957.

FRANKLIN RITTENHOUSE

United States Attorney, and

HOWARD W. BABCOCK,  
Assistant U. S. Attorney;

By /s/ HOWARD W. BABCOCK,  
Attorneys for Appellee.

/s/ MILTON W. KEEFER,  
Attorney for Appellant.

[Endorsed]: Filed May 4, 1957.

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[Title of Court of Appeals and Cause.]

### STATEMENT OF POINTS

Points upon which Appellant intends to rely on in this Appeal are as follows:

1. That the Court erred in finding the Plaintiff's tax liens were paramount and valid liens.
2. The Court erred in finding the sum on deposit with the Defendant Bank in the account of the taxpayer was, at the time of the service of Notice of Levy by the District Director of the Internal Revenue Bureau, property of Bentley, the taxpayer.
3. The Court erred in finding that it was the intention of the parties that the Note was to become due August 14, 1955, unless in the meantime a final demand by the Bank for payment was made.
4. The Court erred in finding that at the time of the service of the Levy, no part of the obligation secured by the Note was due.

5. The Court erred in finding that on June 10, 1955, and prior thereto, the amount on deposit to the credit of taxpayer,

6. The Court erred in finding that the federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan of April 16, 1955, and prior to any right of setoff on the part of the Bank.

7. The Court erred in not finding that the Bank had a right of setoff and applying the funds in Bentley's, the taxpayer's, account on the Promissory Demand Note then due and owing to the Bank

8. The judgment entered pursuant thereto is contrary to law.

9. The judgment entered pursuant thereto is contrary to the evidence.

MILTON W. KEEFER, and  
MAHLON B. BROWN,

By /s/ MILTON W. KEEFER,  
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1957.

Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD  
ON APPEAL

Appellant, Bank of Nevada, designates the following portions of the record, constituting the entire record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint on file herein.
2. Defendant's Answer to Complaint on file herein.
3. Pretrial Order, dated August 28, 1956.
4. Stipulation of Facts entered the 28th day of August, 1956, together with the Supplemental Stipulation entered the 29th day of October, 1956, together with all Exhibits attached thereto marked Exhibits "A" through "H," inclusive.
5. Opinion, Findings of Fact and Conclusions of Law, filed March 14, 1957.
6. Judgment, entered March 29, 1957.
7. Notice of Appeal, filed April 5, 1957.
8. Stipulation eliminating Briefs and Citations for Plaintiff and Defendant and transcript of oral argument of counsel from the Record on Appeal.
9. The Designation of Record on Appeal, filed April 12, 1957, with the Clerk of the United States District Court for the District of Nevada.



10. The Appellant's statement of points upon which he intends to rely.

11. This Designation of Record on Appeal.

Dated this 3rd day of May, 1957.

MILTON W. KEEFER, and  
MAHLON B. BROWN,

By /s/ MILTON W. KEEFER,  
Attorneys for Defendant-  
Appellant, Bank of Nevada

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1957.





